

Zelkowitz



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: MicroSim Inc.--Reconsideration

File: B-234035.2; B-234035.3

Date: October 11, 1989

DIGEST

Request for reconsideration which essentially restates arguments previously considered and does not establish any error of law or provide information not previously considered is denied.

DECISION

MicroSim Inc. requests reconsideration of our decision, DynaLantic Corp., B-234035, May 3, 1989, 68 Comp. Gen. _____, 89-1 CPD ¶ 421, in which we sustained DynaLantic's protest of the Army's award of a contract to MicroSim under request for proposals (RFP) No. DAAJ09-87-R-1222. We deny the request.

The solicitation at issue requested proposals to develop and fabricate helicopter cockpit and emergency procedure trainers for the UH-60A helicopter. After requesting and evaluating best and final offers (BAFOs), the Army, in accordance with the terms of the solicitation, made award to the low bidder, Creativision, Inc. When Creativision subsequently failed to perform, the Army terminated its contract for default. To minimize delays in the repurchase of this equipment, the Army requested each of the five unsuccessful offerors for the original contract award to submit a revised "best and final price and delivery schedule" for the procurement, and at the same time advised these five offerors that "contract negotiations have been concluded." MicroSim submitted the low revised offer and enclosed a summary of what it characterized as six major changes to its original proposal allowing for a substantial reduction in price from its prior offer. Notwithstanding these six identified changes--which included a new, more advanced computer, replacement of MicroSim trainers with different trainers fabricated by a subcontractor, and a change in logistics support--the Army concluded that MicroSim essentially had only revised its price and delivery

046745/139761

schedule in compliance with the BAFO rules and thus made award to that firm.

In our prior decision, we found that while the request for revised BAFOs did not expressly preclude revisions to an offeror's technical approach, the record established that the Army intended that this request be limited to the opportunity to update prices and delivery terms, that the contracting officials had conveyed this intent to DynaLantic and presumably to all other offerors, and that both DynaLantic and MicroSim prepared their respective revised BAFOs with an understanding that this request was limited in scope. We further determined that, contrary to these ground rules, MicroSim's revised BAFO incorporated substantive changes affecting technical approach, management structure and logistics plan, each of which significantly contributed to its reduction in offered price. At the same time, we noted that the other offerors, including DynaLantic, reasonably followed the established instructions and thus, unlike MicroSim, were unable to restructure their proposals or take advantage of advances in technology in an attempt to reduce their prices in what was intended to be solely a price competition among the five remaining offerors.

In view of these findings, we sustained DynaLantic's protest on grounds that the Army failed to assure that offerors were competing on a common basis, and that this failure clearly could have affected the outcome of the competition. We therefore recommended that the Army solicit a third round of BAFOs on the basis of amended procedures allowing for revisions in technical proposals and that if MicroSim is not found to be the successful offeror on the basis of these updated offers, its contract terminated for the convenience of the government, and award made consistent with the established criteria. We also found that DynaLantic was entitled to be reimbursed its protest costs, including reasonable attorneys' fees.

MicroSim, in its reconsideration request, reiterates positions advanced during consideration of DynaLantic's protest, namely that the second BAFO request did not preclude revision of an offeror's technical approach and, alternatively, that its second BAFO did not incorporate any such technical revisions. MicroSim has not, however, proffered any new information showing that our prior decision was founded upon legal or factual errors; instead, MicroSim simply expresses disagreement with our prior decision and restates arguments we previously considered and rejected. We thus decline to reconsider the merits of our

initial decision. See 4 C.F.R. § 21.12(a) (1989); Carrier Joint Venture--Request for Recon., B-233702.2, June 23, 1989, 89-1 CPD ¶ 594 (reconsideration request denied where protester essentially expresses disagreement with prior decision and merely reiterates arguments previously rejected).

MicroSim alternatively seeks modification of our recommendation that the Army reopen the procurement by soliciting a third round of BAFOs on the basis of amended procedures allowing for revisions in technical approach. MicroSim essentially argues that the Army's implementation of this recommendation automatically places it at a competitive disadvantage with respect to the four other remaining competitors, since certain confidential aspects of its proposal, including proposed price and technical approach, were disclosed during consideration of DynaLantic's protest.

While MicroSim complains that all aspects of its technical proposal were disclosed, our review of the record indicates that disclosure was much more limited in scope. MicroSim's price was revealed (as was DynaLantic's), as was an overview of its technical approach. Specific details regarding its approach were not revealed, however; in this regard, we note that our Office undertook all available precautions, including the use of nondisclosure agreements, to safeguard against the disclosure of the specific details of MicroSim's technical approach. For example, MicroSim's intention to use a new, more advanced computer and to subcontract the fabrication of the flight trainers were disclosed, but neither the type and model number of the computer, nor the specifications of the offered trainer were revealed.

We do not think that the disclosure of this rather generic description of MicroSim's proposal, the terms of which are common to any proposal on this procurement, afforded the other four offerors any competitive advantage for the reopened competition. To the extent that it did, however, we do not consider that this warrants modification of our recommendation. Any competitive disadvantage incurred by MicroSim as a result of the Army's adoption of our recommendation is directly attributable to MicroSim's failure to adhere to the established guidelines for the submission of the second round of BAFOs. As stated above, MicroSim incorporated technical changes in its BAFO which allowed it to substantially lower its price; the other four offerors complied with the established ground rules for the submission of second BAFOs, and did not have this opportunity. To equalize the competition, we thus recommended that the Army reopen the procurement and allow each of the competitors to

submit revised BAFOs on the basis of amended procedures. Since MicroSim's own actions compelled this recommendation and, more importantly, since the implementation of this recommendation is necessary to ensure that this procurement is conducted on a common basis, we decline to modify this recommendation. See generally Cubic Corp.--Request for Recon., B-228026.2, Feb. 22, 1988, 88-1 CPD ¶ 174 (risk of auction is secondary to the need to preserve the integrity of the competitive procurement system through appropriate corrective action).

Further, MicroSim contends that the four other competitors can safely revise their respective proposals in a manner consistent with the changes MicroSim incorporated in its second BAFO since these modifications already have been approved by the contracting activity. On the other hand, MicroSim believes that any additional changes it proposes cannot be made without incurring a high risk that its proposal will be found technically unacceptable. MicroSim also argues that the Army improperly failed to require offerors to submit cost and pricing data with their BAFOs, and that DynaLantic has engaged in industrial espionage which mandates its exclusion from the procurement.

First, contrary to MicroSim's view, the request for a third round of BAFOs affords each of the five remaining competitors the same opportunity to update their respective technical approaches. Each of the offerors will incur the same risk that any changes made in technical approach will render its proposal technically unacceptable and thus ineligible for contract award. As stated above, the essential elements of MicroSim's proposal were not disclosed during the bid protest process and therefore, the other four offerors readily cannot adopt MicroSim's technical approach for their own use.

Second, cost and pricing data is generally not required when the contracting officer determines that prices submitted are based on "adequate price competition." Federal Acquisition Regulation (FAR) § 15.804-3(a)(1). Adequate price competition exists if two or more responsible offerors submit offers meeting the government's requirements and the contract is to be awarded to the offeror submitting the lowest evaluated price. FAR § 15.804-3(b). Here, the contract is to be awarded on a firm, fixed-price basis to the low, technically acceptable offeror and the contracting officer, in view of the array of prices previously offered, determined, reasonably we think, that cost and pricing data were not needed to evaluate the reasonableness of the BAFO prices.

Finally, based on the record, it does appear that DynaLantic aggressively pursued information about MicroSim during the course of the procurement by contacting MicroSim itself and its subcontractors, as well as the agency (DynaLantic categorically denies this allegation). However, there is no basis for finding that the the firm engaged in any illegal activities or that its actions fall outside of normal business practices, and there is no indication that DynaLantic was able to obtain technical or pricing information through these activities such that the recompetition would be compromised.

It does appear that DynaLantic was advised--during a communication with the agency to determine the status of the procurement following submission of second BAFOs--that MicroSim was the low offeror in line for award; as any award notice ultimately would have contained the same information, we do not consider this disclosure to have given DynaLantic any improper advantage for the recompetition. In any case, the prices of both offerors were disclosed in our bid protest decision. The record also indicates the Small Business Administration (SBA) may have inadvertently furnished DynaLantic with MicroSim business information which the SBA considered during a certificate of competency review. The SBA itself cannot confirm that it sent DynaLantic anything but a cover letter attached to this information, however, and there is no other evidence that DynaLantic received the information. Moreover, we have specifically rejected suggestions that the recipient of another's proprietary data be eliminated from a competition; we do not believe such action would be a desirable means of removing a possible competitive advantage gained through inadvertent agency disclosure. See Aeronautical Instrument and Radio Co., B-224431.3, Aug. 7, 1986, 86-2 CPD ¶ 170.

The request for reconsideration is denied.


James F. Hinchman
General Counsel